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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 502

BERNARD EUGENE SMITH, ALFRED WILLIAM MANSFIELD, HENRY HOLT, CHARLES FRANCIS HALEY, FREDERICK COSSITT ROGERS, TIMOTHY PATRICK BROSNAN, GEORGE HENRY ROSS, RICHARD FREDERICK TEICHGRAEBER, JOHN WHITNEY, JOHN WILEY JORDAN, JAMES ALOYSIUS KIERNAN, JAMES ARTHUR PRINDIVILLE, ANDREW MITCHELL MONTGOMERY, BENJAMIN EVANS BILLINGS, AND JOSEPH FRANCIS CROWLEY, AS CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THOMSON & MCKINNON,

Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, VAN C. KUSSROW, AS ACTING TAX ASSESSOR, AND H. EARNEST OVERSTREET, AS TAX COLLECTOR IN AND FOR SAID COUNTY,

Appellees.

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE APPEALED FROM AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, Paragraph 1, Bernard Eugene Smith, Alfred William Mansfield, Henry

Holt, Charles Francis Haley, Frederick Cossitt Rogers, Timothy Patrick Brosnan, George Henry Ross, Richard Frederick Teichgraeber, John Whitney, John Wiley Jordan, James Aloysius Kiernan, James Arthur Prindiville, Andrew Mitchell Montgomery, Benjamin Evans Billings, and Joseph Francis Crowley, as co-partners, trading and doing business under the firm name and style of Thomson & McKinnon, the above appellants, file this, their statement particularly disclosing the basis on which said appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the decree appealed from herein as follows:

I.

The statute believed to sustain appellate jurisdiction is Section 344A of Title 28 of the United States Code which provides that

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

II.

Chapter 15789, Laws of Florida, 1931, Volume 1, at pages 1406 to 1412, as approved July 29th, 1931, is a general tax law applicable to intangible personal property. This chapter as re-enacted by Chapter 20724, Laws of Florida, 1941, presently appears in the official Florida Statutes of 1941 as Chapter 199. The pertinent provisions of Chapter 15789 are as follows:

> Section 3 divides intangible personal property into three classes

(1) Class A being stocks, bonds, except exempt governmentals,

(2) Class B, notes, mortgages and liens upon Florida property, and

(3) "Class C intangible personal property shall include all other personal property not embraced in Class A and B intangible property: provided that intangible personal property belonging to the State of Florida or any political subdivision thereof and/or any religious, charitable, benevolent or educational association shall be exempted from taxation: provided, however, that nothing herein contained shall pertain to franchise."

and

Section 12 (B)

"There is hereby annually levied and assessed on all Class C intangible personal property to be apportioned to the State for state purposes a tax of one-tenth of one mill on the dollar of the taxable value of such Class C intangible personal property, to be assessed and collected as other taxes are assessed and collected for state purposes and to be paid into the general revenue fund of the State of Florida." (Under the 1941 Act this levy is ten times higher; i. e., one mill per dollar)

and

Florida's fundamental tax laws provide in Section 893 of the Compiled General Laws of Florida, 1927, now Section 192.01, Florida Statutes of 1941,

"*Subjects of Taxation.* All real and personal property in this state and all personal property belonging to persons residing in this state, not hereby expressly exempted therefrom, shall be subject to taxation in the manner provided by law."

and

In Section 896, Compiled General Laws, 1927, substantially Section 192.03, Florida Statutes, 1941

> "*Personal property defined.* The terms 'personal property' and 'personal estate' as used in this chapter have the same meaning and shall for the purpose of taxation be construed to include all goods and chattels, monies and effects, all boats and vessels, all deeds due or to become due from solvent debtors whether on account, contract, note or otherwise, all public stocks or shares in all incorporated or unincorporated companies."

III.

The decree appealed from was entered on the 20th day of July, 1943, as appears from page 244 of the printed record.

IV.

The application for appeal was presented on the 11th day of October, 1943, as appears from page 209 of the printed record.

V.

The Appeal herein is from a decree of the Supreme Court of the State of Florida affirming the dismissal of appellants' civil suit in equity brought to enjoin the appellees from assessing and attempting to collect an intangible personal property tax upon certain of appellants intangible personal property situate beyond the jurisdiction of the State of Florida.

The appellants, a co-partnership, constitute a stock brokerage firm domiciled in New York City, New York, where the principal office of the firm is located. The firm is engaged in the business of commission brokers for the purchase and sale of securities, executing ninety-nine per-cent of its transactions on the New York Stock Exchange.

This business is carried on in the firm's New York office, except certain services which are purely ministerial, ancillary to the functions of the main office, require the exercise of no discretion, and are performed by branch offices, several of which are located in the State of Florida.

The branch offices take orders from customers for the purchase or sale of securities, which orders are transmitted to the home office in New York City. Said branch offices provide reports on market conditions and quotations by means of a so-called board room where the firm's customers can watch the reflected activitiy of the various securities exchanges, furnish private wire facilities, and perform various other ministerial services. All orders taken by branch offices are subject to approval in New York of a resident New York partner. All exchanges on which the firm trades are located outside of the State of Florida.

Where an approved customer wishes to purchase stock on margin, the appellant firm advances for the account of such customer in New York a portion of the purchase price of the stock. This advance is made in New York at the time the stock is paid for by the appellants, which under the rules of the Stock Exchange, must be within the second business day after the purchase on the Stock Exchange. When a marginal purchase has thus been completed and the appellant firm has advanced a portion of the purchase price of stock, there is created and entered in the books and records of the firm, maintained in its principal office in the State of New York, an account receivable, known in the trade as a marginal customer's "debit balance", which is not evidenced by any specific promise to pay, either written or oral.

This debit balance or account receivable is always secured by the retention of the stock against which the advance was made by the firm. This stock, although belonging to the customer, is never delivered to him so long as there remains unpaid any portion of the said debit

balance or account receivable. Said stock is at all times held within the State of New York by the appellants or by them in turn pledged with a bank in New York to secure a replenishment of that part of the firm's New York capital which was loaned upon the stock.

The appellants filed a bill in equity to enjoin the appellees from levying and attempting to collect an intangible personal property tax upon such marginal customer's debit balances, alleging the modus operandi of appellants' business in detail, and that the imposition of an ad valorem tax upon the said debit balances by the State of Florida would violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

An appeal to the Supreme Court of the State of Florida from a decree dismissing the said bill, resulted in an opinion unanimously holding the bill to contain equity, its allegations to be legally sufficient, and that under said allegations the attempted imposition of the tax would be contrary to the Fourteenth Amendment to the Constitution of the United States, as appears from Exhibit 1 hereto attached. The cause was remanded for further proceedings in accordance with said opinion, and in due course the appellees filed an answer.

Testimony was taken before a Master where the only evidence was that introduced by the appellants. The exhibits and testimony, both on direct and cross-examination, unquestionably sustain every material allegation of ultimate fact as to the method of carrying on the firm's business (Tr. 49-104; App. A), and disclose the identical method of business operation upon which the Supreme Court of Florida predicated its first opinion herein. The trial court again dismissed the bill. Upon a second appeal to the Supreme Court of Florida, the action of the trial court was affirmed, as will appear from Exhibit 2 hereto attached.

The federal questions sought to be reviewed were first raised in Paragraph 8 of the bill of complaint filed in the trial court, in the following language:

> "8. Plaintiffs are further informed and believe and thereupon allege that imposition of such tax is attempted, notwithstanding the conceded fact of foreign ownership of said debit balances, on a presumption that said debit balances are property within the State of Florida. Plaintiffs charge the contrary, and allege that such property is not within the jurisdiction of this State, and that if said statute is interpreted and applied to provide for or authorize taxation of such debit balances, it results in laying a tax on property wholly beyond the jurisdiction of the State, and consequently offends the 14th Amendment of the Federal Constitution and Section 12 of the Declaration of Rights of the Constitution of Florida by depriving the Plaintiffs of property without due process of law, and further violates such provision of the Federal Constitution by denying to Plaintiffs within the State of Florida the equal protection of the laws, and also violates the Commerce Clause of the Federal Constitution (Art. I, Sec. 8, Cl. 3) by imposing a direct burden upon interstate commerce."

And also in the Supreme Court of Florida upon the first appeal, as appears from its first opinion hereto attached, marked Exhibit 1, as follows:

> "It is asserted that the imposition of this tax, because the property is not within the jurisdiction of the state, would violate the 14th Amendment of the Federal Constitution and Section 12 of the Declaration of Rights of the Constitution of Florida by depriving the plaintiffs of property without due process of law. Jurisdiction of the state is challenged on the ground that the domicile of the owner of the debit balances is in New York and therefore no situs exists for taxation in Florida."

The above alleged unconstitutional administration of a general tax law formed the basis of the action, formed the sole ground upon which relief was sought and was necessarily involved in every stage of the proceedings and the determination thereof, including the final determination upon the second appeal.

The above federal questions were first passed upon by the trial court in dismissing the bill of complaint for want of equity (Tr. 16-17); secondly, were passed upon by the Supreme Court of the State of Florida on the first appeal had herein, as appears from a copy of the opinion of said court hereto attached, marked Exhibit 1; and thirdly, were passed upon in the last opinion of said court hereto attached, marked Exhibit 2, by denying the asserted federal rights on a non-federal ground without evidence to support it.

In support of the above assertion that the rulings of the Supreme Court of Florida were of such a nature as to entitle an appeal to the Supreme Court of the United States, the second opinion of the Florida Supreme Court (Exhibit 2 hereof) shows

(1) That the court's erroneous conclusion of a Florida business situs for the intangibles in question was based on uncontroverted facts established in the record rather than upon want of proof of any particular facts;

(2) That the court purportedly adheres to its first opinion upholding its earlier decision on the strict requirements for business situs of intangibles for its residents, but now relaxes the rules where foreign-owned and held intangibles are involved.

Thereby the court sanctioned an administration of the Florida tax law in violation of the due process clause of,

and denied equal protection of the law contrary to, the Fourteenth Amendment to the Constitution of the United States.

VI.

The grounds upon which it is contended the questions involved are substantial are

(a) This case is one of first impression in that it has never before been held by this or any other court that a state can lawfully tax intangibles neither held, owned nor possessing a business situs within its jurisdiction.

(b) The federal questions raised are of national importance because the decision appealed from, if adopted by the courts of other states, will place an unjust and unwarranted burden upon the financial business of the country, not only as to the appellants and others similarly engaged in said business, but also as to the general investing public.

(c) Although the Supreme Court of Florida upon the second appeal held as a result of a finding wholly without evidence to support it that the tax complained of may be lawfully imposed, nevertheless upon the first appeal the said court in an unanimous opinion held upon the same facts that the imposition of the tax complained of would violate the provisions of the Constitution of the United States.

VII.

Unless otherwise noted herein all record references are to be printed transcript as prepared and filed in the Supreme Court of the State of Florida upon the second appeal.

VIII.

The cases believed to sustain the jurisdiction are as follows:

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194.

Safe Deposit and Trust Co. v. *Virginia*, 280 U. S. 83; *Curry* v. *McCanless*, 307 U. S. 357.

Myles Salt Co. v. *Board of Commissioners of Iberia and St. Mary's Drainage District*, 239 U. S. 478.

Fisk v. *Kansas*, 274 U. S. 380.

Aetna Life Insurance Co. v. *Dunken*, 266 U. S. 389.

Eureka Pipe Line Co. v. *Hallaman*, 257 U. S. 265.

United Fuel Gas Company v. *Hallaman*, 257 U. S. 277.

United Gas Public Service Co. v. *Texas*, 303 U. S. 123.

Great Northern Railroad Co. v. *Washington*, 300 U. S. 154.

Carpenter v. *Shaw*, 280 U. S. 363.

Beidler v. *South Carolina Tax Commission*, 282 U. S. 1.

Baldwin v. *Missouri*, 281 U. S. 586.

Johnson Oil Refining Company v. *Oklahoma, ex rel. Mitchell*, 290 U. S. 158.

Norris v. *Alabama*, 294 U. S. 587.

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737.

Broad River Power Company v. *South Carolina, ex rel. Daniel*, 281 U. S. 537.

Creswill v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246.

Enterprise Irrigation District v. *Farmers Mutual Canal Company*, 243 U. S. 157.

Chicago, Burlington and Quincy Railway v. *People of Illinois, ex rel. Grimwood*, 200 U. S. 561.

West Chicago Street Railroad Co. v. *Illinois, ex rel. Chicago*, 201 U. S. 506.

Lawrence, et al. v. *State Tax Commission of Mississippi*, 286 U. S. 276.

Dated this 11th day of October, A. D. 1943.

Respectfully submitted,

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EXHIBIT "1".

IN THE SUPREME COURT OF FLORIDA JANUARY TERM A. D. 1942 EN BANC.

BERNARD EUGENE SMITH, et al., as co-partners, trading and doing business under the firm name and style of Thomson & Mckinnon, *Appellants,*

vs.

J. N. LUMMUS, JR., as Tax Assessor of Dade County, Florida, and HAYES WOOD, as Tax Collector in and for said County, *Appellees.*

Dade County

Opinion filed March 6, 1942,
Rehearing denied March 24, 1942.
An Appeal from the Circuit Court for Dade County, Ross Williams, Judge,

Rinehart & Carroll, George H. Salley, Hall, Cunningham & Haywood (New York City) for Appellants,
J. Tom Watson, Attorney General, Lawrence A. Truett, Assistant Attorney General, Ward & Ward, Joseph Weintraub, for Appellees.

THOMAS, J.:

A bill of complaint was filed by various persons, copartners doing business as Thomson & McKinnon, against the tax assessor and tax collector of Dade County, Florida, seeking an injunction against them to prevent their assessing and collecting taxes on certain intangible personal property of the plaintiffs described as accounts receivable from customers or debit balances growing out of transactions which we will describe in our analysis of the bill of complaint.

The facts which we will give are those offered to be proved by the plaintiffs in support of their prayer for relief. The copartnership is domiciled in New York where it conducts its business "as commission broker for purchase and

sale of securities * * * on the New York Stock Exchange" and other exchanges located there and elsewhere. Its agents solicit business in other states, including Florida where it maintains offices in many cities, one of which is Miami.

The so-called agencies serve the firm by giving market quotations and other information to prospective customers, by furnishing them facilities incident to the business of the copartnership, by accepting and sending to the main office at New York orders from clients for the purchase and sale of stocks and commodities.

The tax assessor has demanded that a return be made of intangible personal property subject to taxation under Classification C, Section 3 of Chapter 15789, Laws of Florida, Acts of 1931, Ex. Sess., specifically described as "all amounts appearing on the firm's records as indebtedness from customers dealing with the firm through its Florida agents."

It is asserted that the imposition of this tax, because the property is not within the jurisdiction of the state, would violate the 14th Amendment of the Federal Constitution and Section 12 of the Declaration of Rights of the Constitution of Florida by depriving the plaintiffs of property without due process of law. Jurisdiction of the state is challenged on the ground that the domicile of the owner of the debit balances is in New York and therefore no situs exists for taxation in Florida.

The debit balances have no reference to transfers of property of any kind "brought into the State or held or owned in the State" and "no merchandise or stock in trade" is sold here. These debit balances arise from transactions for sales and purchases elsewhere by plaintiffs for the account of customers whom the copartnership serves as broker "on a 'marginal' basis" and they represent advances for the residue of the market price when but a part of it is paid by the customers. These loans are made only in another state and never in the State of Florida. No money or capital forming the source of such loans to customers is kept in this state. When such loans are made they are not evidenced by promissory notes or other writ-

ing and are secured by retention of the securities in New York with the right in the broker of transferring them for its protection. The stocks, on which the firm has advanced part of the purchase price and which it holds to secure the payment of the remainder due by the customer, are held in the foreign state. The debt "is created by and under the laws of the State of New York and independent of the laws of Florida." The copartnership does not resort to the laws of Florida to effect collection of debit balances and the so-called agencies are not authorized to collect accounts. There is no competition with any business in Florida and the debit balances are not the result of any loans made by any representative here.

Whenever a customer wishes to pay to the firm any money in "reduction or discharge of a debit balance, or for margin or additional margin," he may deliver the money to the Florida agent who gives him in exchange a temporary receipt but the agent has no authority or control over the money received except to send it intact to New York or to place it in a bank account from which it may be withdrawn only by the principal office. Upon notice from the agent the customer's account in New York is then credited immediately with the amount of the payment.

None of the moneys received by the agents may be applied by them to the expenses of the agency, funds for that purpose being supplied out of the firm's general capital and held in a local bank account separate from moneys paid to the firm by customers. All records of customers' accounts are kept at the home office and it is from there that all formal notices, reports of transactions and statements are furnished. Approval and acceptance of customers is made entirely in New York and with reference to these matters agents in Florida have no authority. In the conduct of its business the copartnership complies with the rules of the New York Stock Exchange and other exchanges, requirements of the laws of the State of New York and the acts of Congress.

It was the opinion of the chancellor that the bill was without equity, so he dismissed it and the matter reaches us on an appeal from that final order.

In considering the propriety of the chancellor's action dismissing the bill of complaint we think it is well to use as an introduction to our observations the statement that we long ago recognized the general rule that personal property has its taxable situs in that state where the owner of it is domiciled, Hunt v. Turner, 54 Fla. 654, 45 So. 509, and therefore we feel that the question presented to us for determination is the one whether the circumstances outlined in the bill of complaint, as they appear from our somewhat brief analysis, bring into play any of the exceptions which from time to time have been applied to facts in particular cases. Wood v. Ford, Fla., 3 So. 2d 490.

As we understand the representation made by the plaintiffs they are engaged in the business of taking orders for the purchase and sale of stocks and where they are bought by the customer, without payment of the full price, the remainder is loaned by the firm. To secure the obligation the broker retains the stock and the relationship between the broker and customer may be terminated and the stock transferred on demand of either party. To expand this business an agency was set up in Miami and the representatives there perform certain services in furtherance of the firm's business. Our study of the bill, however, leads us to the inescapable conclusion that in doing so they exercise no discretion whatever and perform purely ministerial duties. Thus, these agents may receive an order for the purchase or sale of stock and accept payments of money from customers but they have no power to pass on the credit standing of any one who applies to buy stock on margin nor do aught with the money they receive than deposit it in a Florida bank to the firm's account in New York City and it is only by the firm that it can be withdrawn.

According to the bill an entirely separate account is kept for the purpose of paying salaries and operating expenses, and so as far as we can see the agency in the State of Florida is not self-operating and does not constitute an independent business. The plaintiffs have paid all ad valorem taxes assessed and levied against them in Florida and have also "paid all excise or occupational taxes which have been im-

posed by the State and the counties and municipalities in which its agents have acted. In addition thereto, the Plaintiff firm has duly made returns and paid, in the various counties in which it has been so assessed, intangible personal property tax on the cash in bank held by its agents as of the first of each year in which so required, being the money of the firm held by the respective agents for the operation of the agency or temporarily in the agent's hands for remittance to the New York firm. None of such taxes are now due or unpaid."

Scrutiny of the plan of operation of the agencies in Florida clearly indicates that the property in question does not fall within the exception described in Hunt v. Turner, supra.

Taxes are the contributions from persons and property levied by the state for the support of the government. Therefore, whether they derive from tangibles or intangibles the use of them is the same and as they are enforced by the state in its sovereign capacity persons and property not within its territorial limits cannot be subjected to its levy. Cooley on Taxation, 4th Ed., Section 1, Chapter 1. By the same authority it is stated that this power of the state to tax does not "as a general rule extend to the intangible personal property of a nonresident, for such property must ordinarily be regarded as having its situs at the domicile of its owner." Cooley on Taxation, 3d Ed., page 89.

The purpose of taxation being collection of money by the sovereign to meet the public needs and the cost of the maintenance of government itself it seems fundamental that there should be a corresponding privilege and protection for which taxation is imposed, therefore, if one domiciled in one state is maintaining a business in another and receiving all the advantages that the government of the latter and its various branches afford in the protection and the maintenance of the business a resulting obligation arises on the part of the taxpayer to pay his proportionate share in taxes to the public exchequer.

It seems to us from our study of the authorities that the exception to the rule that the tax on intangible personal property should be levied at the domicile of the owners

arises in those cases where, because of activity in another state involving the property, they receive such benefits and protection under the laws of that state that they should make a contribution to its government.

It is conceivable that one in a business like that conducted by the plaintiffs could establish an office in a state other than the domicile, provide a fund there to be used by representatives in the purchase of stock and in financing customers with authority on the part of the representatives to draw upon their business judgment and discretion in the operation of the business and thereupon become liable to taxation upon the property of the enterprise.

That, however, is not the situation with which we are dealing. It cannot be deducted that the plaintiffs are escaping the contribution they should make to the government of the State of Florida in order for them to conduct their business here. It is alleged in the bill of complaint, and admitted for the purpose of the motion to dismiss, that they pay taxes on all other property held by them within the borders of the state assessed upon an ad valorem basis in addition to excise and occupational levies. They complain solely because of the proposed assessment and levy on the so-called debit balances or accounts receivable. They resist taxation of these items because, so far as the local agency is concerned, the activity is a strictly representative one, wholly dependent upon the principal office. The transactions in Florida are, so it is urged, ancillary to the business operated at the domicile of the owner in New York. In the general business affairs of the plaintiff there are many features calling for the exercise of judgment and discretion. All of those features are absent from deals made in Florida. We iterate when we call attention of the reader to the averments that the representatives of the firm in this state exercise none of such judgment or discretion but simply perform the clerical services incident to the business.

When we contrast the field of activity in Florida with that in New York, it is apparent that the former is by no means as extensive as the latter and we think the restricted operation here refutes the argument that there is a business situs

so distinct that taxation on intangibles is justified. This position is in harmony with the authority which we have already cited, Cooley on Taxation, 4th Ed., Volume 2, page 1037, where it is said that no situs exists "where the agent in the state is a mere custodian or clerk or order taker."

When the relative activity of the principal office and the agency is borne in mind we are convinced that by paying the taxes which we have detailed in quoting from the bill the plaintiffs make their full contribution to the protection which the government of this state affords in the maintenance of an agency which cannot be called independent of the principal office.

Our conclusion harmonizes with the view of the supreme court of the United States in Curry v. McCanless, 307 U. S. 357, at page 368, 59 S. Ct. 900, at page 906, 83 L. Ed. 1339, 123 A. L. R. 162, where it was stated: "The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business." This decision was referred to in Wood v. Ford, supra.

If we are to follow the rule which we stated at the outset, with reference to taxation at the situs, the State officials would go beyond the sphere of their authority if they assessed and collected taxes on the debit balances when all save certain mechanical activities with reference to them are, according to the allegations of the bill of complaint, controlled entirely from another state. We cannot find in the bill of complaint alleged facts which would warrant a construction placing the intangibles within the exception to the rule.

We emphasize that appellants allege they pay without complaint all ad valorem and excise taxes and likewise all taxes on intangibles that have a taxable situs in this state. The effect of what we have written is only to relieve them from the burden on intangibles the situs of which is fixed in the foreign state.

We therefore reverse the decree with instructions to the chancellor to proceed in accordance with the views we have given.

BROWN, C. J., and WHITFIELD, TERRELL, BUFORD, CHAPMAN, and ADAMS, JJ., concur.

EXHIBIT "2".

IN THE SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1943, EN BANC.

BERNARD EUGENE SMITH, et al., as Co-partners, Trading and Doing Business under the Firm Name and Style of Thomson & McKinnon, *Appellants*,

vs.

J. N. LUMMUS, JR., as Tax Assessor of Dade County, Florida, and HAYES WOOD, as Tax Collector in and for Said County, *Appellees*.

Dade County.

Opinion filed July 20, 1943.

An appeal from the Circuit Court for Dade County, Ross Williams, Judge.

Rinehart & Carroll, George H. Salley, Hall, Cunningham & Haywood (New York City) for Appellants.

J. Tom Watson, Attorney General; Lawrence A. Truett, Assistant Attorney General; Ward & Ward, Joseph Weintraub, for Appellees.

CHAPMAN, J.:

This suit comes here for the second time. It originated in the Circuit Court of Dade County, Florida, and sought a restraining order against the assessment and collection of a tax on described intangible personal property owned by Thomson & McKinnon, a partnership, and the situs of the intangibles is alleged to be in New York and not Dade County, Florida. The prayer of the bill was designed to ultimately restrain Tax Assessor Lummus and Tax Collector Wood, each of Dade County, Florida, from the collection of an intangible tax on the described personal property. The Chancellor sustained a motion to dismiss, for want of equity, and on appeal here the said order was reversed. See Smith vs. Lummus, 149 Fla. 660, 6 So. (2d) 625.

On the return of the mandate, an answer by the defendants was filed, which denied the material allegations of the bill of complaint. The cause was by the Chancellor referred to the Honorable W. D. Bell, as Special Master, with directions to take testimony and make findings on both law and facts and recommendations as to a decree. The record discloses that the plaintiffs adduced but a single witness, James A. Kiernan, coupled with a number of exhibits appearing in the transcript and identified as Exhibits 1, 2, 3, 4, 5 and 6. The defendants did not offer any testimony before the Special Master and counsel for appellee contend that the evidence adduced by the plaintiffs failed to establish the material allegations of paragraph 9 and subsections thereof identified in the bill of complaint as (1) to (X), inclusive.

The report to the Chancellor as made by the Special Master was excepted to, and on hearing by the Chancellor an order was entered ratifying and confirming the report and recommendations of the Special Master, and by appropriate order dismissed the bill of complaint, and an appeal therefrom has been perfected by the plaintiffs below to this Court, being the second appeal in this cause.

Counsel for appellants contend that the law of the case was settled or established in the former appeal in which we held that the allegations of the bill were sufficient for equitable relief as against a motion to dismiss made by the defendants below for want of equity. That the testimony of the witness Kiernan, coupled with the Exhibits 1, 2, 3, 4, 5, and 6 adduced by the plaintiffs fully sustain the allegations of the bill, when it becomes the lawful duty of the Chancellor not to dismiss the cause but to enter a decree for the plaintiffs in accordance with the prayer of the bill. That the recommendations to the Chancellor by the Special Master as to the form of the decree to be entered were clearly erroneous and the exceptions thereto filed by the plaintiffs should have been sustained.

Counsel for appellees agree that the law of the case was settled by this Court on the former appeal, but contend that the law is inapplicable to the facts proven by the plaintiff. That a variance now exists between the probata and

allegata in that paragraph 9 of the bill of complaint which alleges that the assessments are void and the taxes imposed illegal because the domiciliary ownership of the debit balances is in New York; and (2) the debit balances do not have a situs for taxation in the State of Florida. That the evidence adduced by the plaintiffs failed to establish these material issues and the decree of dismissal was the only one the Chancellor could have entered.

Mr. Kiernan testified that he was a member of the partnership of Thomson & McKinnon and resided in New York City, and supervised or approved customers' accounts of the firm. The firm is a member of the New York Stock Exchange and acted as brokers in securities and commodities on a commission basis. The firm transacted business on the stock exchanges in New York, Chicago, Toronto, and possibly Indianapolis. The firm has maintained an office in Miami, Florida, for several years and in other Florida cities during the Winter seasons.

The Miami office was under the managmeent of Mr. Griffin and it had approximately twelve employees. The employees consisted of an (a) order clerk; (b) telephone operator; (c) two board markers; and (d) customers' men employed to contact customers in placing orders. The Miami branch provided services for its customers viz: (1) a board room where customers could visit and observe the market; (2) price quotations appeared on the board in the customers' room; (3) the morning newspaper was supplied; (4) advice was supplied to customers on demand; (5) trade journals and information in abbreviated form were supplied; (6) the customers' men were highly trained and well educated about stock transactions; (7) the statistical department service maintained at the New York office was not supplied but could be supplied on demand; (8) customers' men are paid on a commission basis.

Mr. Griffin, manager of the Miami Branch, paid rentals and operation costs by checks drawn on a Miami bank identified as the "Manager's Account", and these funds are supplied from the New York office. The firm of Thomson & McKinnon opened an account with a Miami bank for a specified amount, which is referred to as the "Customers'

Account", and deposits are sent there from the New York office. The manager of the Miami branch is authorized to make payment to customers of the Miami branch from the "Customers' Account" drawn on a Miami bank in a sum of not to exceed $5,000.00. Money had been transferred from the "Manager's Account" to the "Customers' Account" and customers paid therefrom by the manager. Orders from the Miami branch are transmitted to the New York office by private wires and Mr. Kiernan approves or disapproves the orders. The books are kept in the New York office of transactions originating in the Miami branch and only memoranda made and preserved at the branch office. The Miami branch paid the City of Miami $550.00 occupational tax and paid taxes to the State of Florida in 1939 in the sum of $2,625.97, and $2,673.52 in 1940.

The procedure observed in the purchase of 100 shares of Chrysler stock on the stock exchange through Thomson & McKinnon, brokers, for instance, is about as follows: the purchaser appears in the Miami branch or calls it over the telephone, when a confidential report of the prospective customer is obtained, being Plaintiffs' Exhibit #2. The application is sent by the Miami branch office to the New York office, and is approved or disapproved by Mr. Kiernan. If the account is accepted the customer is requested to sign a "Customers' Agreement", being plaintiffs' Exhibit #4. If the customer purchases the stock on margin, he pays e. g. 40% cash to the manager of the Miami branch and the same is by him transmitted to the New York office and the stock purchased by Thomson & McKinnon. The broker advances 60% of the purchase price of the 100 shares and retains the physical custody of the stock as security under the authorization agreement viz:

"AUTHORIZATION

Provided for by Resolution of the Governing Committee of the New York Stock Exchange Adopted February 10, 1932.

....., 1943.

Messrs. Thomson & McKinnon,
11 Wall Street,
New York City.

DEAR SIRS:

You are hereby authorized by the undersigned to loan from time to time, either to yourselves as brokers or to others, any or all stocks, bonds and other securities which you may now or hereafter hold for the account of the undersigned, either separately or together with other securities.

The authority herein granted shall remain in full force and effect until you shall receive written notice of its revocation.

Very truly yours,

(Signed) ....."

If Thomson & McKinnon pays $100,000.00 for 100 shares of Chrysler stock on the New York Exchange for the accommodation of a customer purchasing through their Miami branch, it possibly becomes a profitable transaction for the firm. Thomson & McKinnon receive a commission as brokers and interest on the "Debit balance" due by the Miami customer and payment secured by the Chrysler stock. The 100 shares of stock is the property of the Florida customer pledged by him for the payment of the money loaned. Paragraph 7 of the bill of complaint alleges that the domiciliary ownership of the "debit balance" is in New York. We are unable to find the testimony in the record to support this allegation. The customer resides in Florida; the original payment was made by him in Florida at the branch office; interest and broker commissions are paid in Florida; Florida law protects the branch office and business transactions had therein; Florida courts provide forums for adjudication of differences arising out of the transactions, and for these several reasons it cannot be said that the "debit balances" originated in New York, as alleged, to the exclusion of the State of Florida.

It is our conclusion that the appellants failed to establish by competent testimony the material allegations of the bill of complaint and we fail to find error in the order of the Chancellor dismissing the cause on final hearing. See Settles vs. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 10 S. E. (2d) 396; Wisconsin vs. J. C. Penny Co., 311 U. S. 435, 61 Sup. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229; Curry vs. McCanless, 307 U. S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. Ed. 762, 31 Sup. Ct. 550.

Affirmed.

Buford, *C. J.*, Brown and Sebring, *J. J.* concur.
Terrell, Thomas and Adams, *J. J.* Dissent.

(9075)

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 502

BERNARD EUGENE SMITH, ET AL., AS CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THOMSON & McKINNON,

Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

GEORGE H. SALLEY,
CHARLES A. CARROLL,
Counsel for Appellants.

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Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, ET AL.,

Appellees.

MEMORANDUM BRIEF OPPOSING APPELLEES' MOTION TO DISMISS.

(Under Rule 7, Paragraph 3.)

I.

Federal Questions Were Raised and Decided in the State Court.

The contention of the Appellees that no federal questions were raised or decided by the Supreme Court of Florida upon the second appeal because said Court failed, in its opinion, specifically to discuss the federal questions, when deciding the case on its merits, is wholly unsound.

The federal questions were, at the outset, raised in Paragraph 8 of the bill of complaint in the following language:

> "Plaintiffs charge the contrary, and allege that such property is not within the jurisdiction of this State, and that if said statute is interpreted and applied to provide for or authorize taxation of such debit balances, it results in laying a tax on property wholly beyond the jurisdiction of the State, and consequently offends the 14th Amendment of the Federal Constitution and Section 12 of the Declaration of Rights of the Constitution of Florida by depriving the Plaintiffs of property without due process of law, and further violates such provision of the Federal Constitution by denying to Plaintiffs within the State of Florida the equal protection of the laws, and also violates the Commerce Clause of the Federal Constitution (Art. I, Sec. 8, Cl. 3) by imposing a direct burden upon interstate commerce."

These federal questions were again raised in the Supreme Court of Florida upon the first appeal of this case to said Court. The Supreme Court of Florida was fully cognizant of the fact that federal questions were involved as shown by its reference to some of them in the first opinion rendered in this case, by direct reference, as well as by the holding of the Court that to sanction the attempted taxation on the facts alleged in the bill would be in violation of such pleaded constitutional restrictions.

The federal questions were raised again upon the second appeal to the Supreme Court of Florida because at that time the same identical bill of complaint containing such federal questions was again before the court. The fact that the opinion of the Supreme Court of Florida upon the second appeal failed to refer specifically to the federal questions cannot destroy the effect of the manner in which the federal questions were raised and presented to the Court. Under such circumstances, it has been settled by this court that federal questions were properly raised. *New York*

ex rel. Bryant v. *Zimmerman, et al.*, 278 U. S. 63. *Dewey* v. *City of Des Moines*, 173 U. S. 193. *Cissna* v. *Tennessee*, 246 U. S. 289. *Dickenson* v. *Stiles*, 246 U. S. 631.

The contention of the Appellees that the federal questions were not raised or decided by either the trial court or the Supreme Court of the State of Florida is equally unsound. This is so because the determination of the federal questions raised in the bill of complaint was necessarily involved in the disposition of the case by the trial and appellate court and the necessary effect of the decision on the second appeal has been to deny the federal claims asserted. *Kaukauna Water Power Co.* v. *Green Bay and Miss. Canal Co.*, 142 U. S. 254. *New York, ex rel Bryant* v. *Zimmerman, et al.*, 278 U. S. 63.

The opinion of the Supreme Court of Florida upon the second appeal shows that the decision rested not upon want of proof of particular facts, but upon the erroneous application of the law by that court to certain established facts. The reasons given by the court are: (1) "The customer resides in Florida," (2) "The original payment was made by him in Florida at the branch office," (3) "Interest and brokerage commissions are paid in Florida," (4) "Florida law protects the branch office and business transactions therein," (5) "Florida courts provide forums for adjudication of grounds arising out of the transactions." Each of those assigned reasons appeared from the bill itself, and no question of proof or want of proof is involved in any of them. Indeed, even if the Supreme Court of Florida had said in its second opinion, "Every allegation of the bill has been proved," it could still have made the same five observations.

Therefore, said decision that the debit balances or accounts receivable "Originated" in Florida and by that fact were localized for taxation, notwithstanding all other facts alleged and proved in regard thereto, necessarily

had the effect of holding that taxation of the intangibles, in the situation presented, was not a denial of the federal claims asserted by the plaintiffs. Those assigned reasons of the Florida Supreme Court wholly ignored the allegations of the bill and the proof to the effect that the intangibles never became an integral part of any independent business conducted by the Appellants in Florida, and the many other factors relied on by plaintiffs as placing the property outside of Florida.

The Florida Supreme Court's decision could only have been reached on one of the following three bases: (1) Domicile of the plaintiff stock brokerage firm in the State of Florida; or (2) A business situs for the intangibles in question in the State of Florida; or (3) The erroneous view (held by the trial court) that the doing of some business in Florida by the New York firm would justify taxation of foreign held intangibles, as in the case of an excise tax.

The decision was not on the first basis mentioned. The Florida Court did not hold that the plaintiffs failed to show that the firm of Thomson & McKinnon, a New York partnership, was a non-resident of Florida. There is no holding that the plaintiff partnership is domiciled in Florida. The theory expressed by the court was that it viewed the debit balances as being within the State of Florida, and therefore owned *in* Florida and not owned *in* New York.

If the decision was predicated on the second basis mentioned, that of a Florida business situs for the intangibles, the reasons which the court assigned obviously could not support such a holding because they ignore the established standards and requirements for determination of business situs, and because they disregard the showing, by allegation and proof, that the intangibles were not localized by becoming an integral part of any independent business in the State of Florida, did not form a part of the firm's capital in Florida, were not the product or subject of any

loans made within that State, and that the agents of the firm in Florida acted only in a clerical and ministerial capacity in soliciting customers for foreign brokerage transactions and were without authority to lend money or to enforce collection of the accounts in question or to use or handle the proceeds thereof other than to transmit them to New York where such assets were a part of the firm's general capital. A judicial determination that intangibles of a non-resident have a business situs in a State apart from the State of the owner's domicile inescapably involves the question of constitutionality under the Fourteenth Amendment.

If the decision was predicated on the third basis, mentioned above, on the theory that the doing of some business in Florida by the plaintiff New York brokerage firm is enough to sanction the taxation of intangibles accruing to the firm as a result thereof, in spite of the fact that such intangibles do not have a business situs in Florida, then the federal questions asserted are necessarily raised, because (a) the attempt is to tax property admittedly beyond the State's jurisdiction, in violation of the due process clause, and (b) because the standard thus applied to non-residents is different from that which said court in *Hunt* v. *Turner*, 54 Fla. 654, 45 So. 509, has announced is applicable to Florida residents, resulting in a denial of equal protection of the laws.

The entire first section of the Appellees' statement is based upon the false premise that the tax sought to be enjoined is in the nature of an income, privilege, or excise tax which becomes proper upon a mere showing that Thomson & McKinnon do some business within the State of Florida. The tax sought to be imposed and to which the Appellants object is a general ad valorem tax on intangible personal property. (See Appellants' Statement under Rule 12). It is leviable only upon property *in* the

State of Florida or owned by persons *residing* in the State of Florida. (See paragraph 2 Appellants' Jurisdictional Statement.)

The Supreme Court of the State of Florida regardless of its announced reasons has in effect held that by accepting orders through a branch office in Florida and there rendering certain perfunctory services of a clerical and ministerial nature, purely non-discretionary in character, the Appellants have placed the debit balances, owing from such of the firm's customers as avail themselves of these facilities, under the taxable jurisdiction of the State of Florida; and this although by every previously existing legal test the intangibles mentioned have acquired no business situs in Florida.

It is not necessary to look beyond the two opinions of the Supreme Court of Florida (Exhibits 1 and 2 to Appellants' Jurisdictional Statement) to perceive this to be so. As has been stated in an *Annotation in 143 ALR 361, at page 383,* the Florida Supreme Court in its first opinion held that the utter lack of discretion in the Florida branch agencies denied the debit balances a business situs in Florida.

> "• • • In Smith *v.* Lummus (1942)—Fla.——6 So (2d) 625, a partnership domiciled outside the state conducted its business as commission broker for the purchase and sale of securities from its main office but kept a branch agency within the state for taking orders for the purchase and sale of stocks and for giving information to prospective customers. The agents could only receive orders for stock transactions and accept payments from customers but they had no power to pass on the credit standing of anyone who applied to buy stock on margin nor to do anything with the money they received other than deposit it in a bank to the partnership's account. An entirely separate account was kept for the purpose of paying salaries and op-

erating expenses of the branch agency. The court, coming to the 'inescapable conclusion' that the agents exercised no discretion whatever and performed purely ministerial duties, concluded that the agency was not self-operating and did not constitute an independent business, and that therefore it did not have a situs within the state so as to be subject to personal property tax. The decision clearly shows that the extent of the authority of the local agent was the decisive factor in the mind of the court in determining whether the credits extended to customers dealing with the partnership through the agency had a business situs in the State for the purpose of taxation. 'It is conceivable', the court declared, 'that one in a business like that conducted by the plaintiffs (the partnership) could establish an office in a state other than the domicil, provide a fund there to be used by representatives in the purchase of stock and in financing customers with authority on the part of the representative to draw upon their business judgment and discretion in the operation of the business, and thereupon become liable to taxation upon the property of the enterprise. That, however, is not the situation with which we are dealing. * * * In the general business affairs of the plaintiff there are many features calling for the exercise of judgment and discretion. All of those features are absent from deals made in Florida (the state where the agency was situated). We iterate when we call attention of the reader to the averments that the representatives of the firm in this state exercise none of such judgment or discretion but simply perform the clerical services incident to the business. * * * And we think the restricted operation here refutes the argument that there is a business situs so distinct that taxation on intangibles is justified."

In this opinion the Florida court said:

"If we are to follow the rule which we stated at the outset, with reference to taxation at the situs, the

State officials would go beyond the sphere of their authority if they assessed and collected taxes on the debit balances when *all save certain mechanical activities with reference to them* are, according to the allegations of the bill of complaint, controlled entirely from another state." (See Exhibit 1 to Appellants' Jurisdictional Statement).

Later, in its opinion on the second appeal, as noted, a majority of the Court enumerated a few of those same "mechanical activities" as necessitating a conclusion that the debit balances are taxable by the State of Florida. Such a conclusion forces the Appellants to pay an illegal assessment upon property beyond that State's jurisdiction, and this is contrary to the prohibitions of the Federal Constitution.

Union Refrigerator Transit Company v. *Kent,* 199 U. S. 194;

Safe Deposit & Trust Company v. *Virginia,* 280 U. S. 83;

Curry v. *McCanless,* 307 U. S. 357.

The Supreme Court of Florida, despite its assertion to the contrary, has said, in effect, that even if the property is without the jurisdiction of the State of Florida she may lawfully tax it. Such a ruling presents a Federal question for the proper consideration of this Honorable Court. This Court has held many times that it must itself determine whether or not a Federal question is involved and for such purpose will examine the record.

U. S. v. *Pink, Supt. of Insurance State of New York,* 315 U. S. 203, 62 S. Ct. 552 @ 559.

"This Court will review or independently determine all questions on which a federal right is necessarily dependent. U. S. *v.* Ansonia Brass & Copper Co., 218 U. S. 452, 462, 463, 471, 31 S. Ct. 49, 50, 51, 54;

54, L. Ed. 1107; Ancient Egyptian Order *v.* Michaux 279 U. S. 737, 744, 745, 49 S. Ct. 485, 488, 73 L. Ed. 931; Broad River Power Co. *v.* South Carolina 281 U. S. 537, 540, 50 S. Ct. 401, 402, 74 L. Ed. 1023; Pierre *v.* Louisiana, 306 U. S. 354, 358, 59 S. Ct. 536, 83 L. Ed. 757.

Honeyman v. *Hanan,* 300 U. S. 14, 57 S. Ct. 350 @ 352.

> "As this Court must decide whether it has jurisdiction in a particular case this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record."

The conclusion of the Florida Supreme Court that the Plaintiffs, Appellants, failed to prove the bill is unfounded.

All of the material elements concerning the conduct of Appellants' business, as alleged in the bill, coincide with those disclosed by the testimony and exhibits constituting the proof in this case, and every such element is proven. The weight and sufficiency of one witness' testimony has been held adequate to support the burden of proof in a law suit. The law adopted by the Supreme Court of Florida in the case of *Jacksonville Traction Co.* v. *Greene,* 151 So. 523, 113 Fla. 316, is:

> "Plaintiffs' uncorroborated testimony, if reasonable, can carry the burden of proof unless contradictory evidence was so strong and positive that a verdict approving a single witness is clearly against the manifest weight of the evidence."

The proof in this case is plentiful to convince an open mind, and the law does not require that it meet the burden of convincing a prejudiced one *(20 Am Jr. 1026),* nor that each element be established as a certainty to the exclusion of every other possibility.

"In order to arrive at a conclusion upon a question of fact, the rule of evidence does not require that there should be that amount of certainty which will exclude the possibility that the fact can be otherwise, but only that it shall be of such a degree, induced by appropriate evidence, as will produce moral conviction."

Smith v. *Croom*, 7 Fla. 81.

The testimony of Mr. Kiernan is not unduly extensive. The complete transcript of his examination, both direct and cross, is set out in the record (R. 49-104). This testimony, together with the exhibits contained in Appendix A (R. Appendix A, 1-45), constitutes the evidence in this cause. Since this Honorable Court, itself, will want to examine the evidence, we would like to point out that all of the particular allegations referred to in the first opinion of the Florida Supreme Court were proved by positive and undisputed testimony.

1. Domicile and centralization of the brokerage business in New York was shown (R. 49-54, and Exhibits 1 and 6 at pages 1 and 43 of Appendix A).

2. Plaintiffs are commission brokers, not dealers (R. 53).

3. The branch offices, or agencies, merely solicit business (R. 56 and 80), and cannot trade directly on any exchange (R. 65 and 79).

4. The agencies furnish quotations and statistical data and other assistance to customers desiring to place orders (R. 57), and accept and send orders to the main office for execution (R. 63 and 65).

5. The attempted application of the general intangible tax law to the challenged tax was admitted by answer.

6. The debit balances have no reference to property "brought into the State or held or owned in the State" (R. 73).

7. "No merchandise or stock in trade" is sold here (R. 73).

8. Debit balances arise in margin accounts only (R. 54) on margin purchases, and not on margin (short) sales (R. 62).

9. A debit balance is an obligation of a customer which arises when payment is made, in New York, by the firm, to a third party, for the account of the customer, of the price of the stock (R. 66, 67, 68, 74).

10. The debit balance is not to be confused with the margin or customer's equity. The margin, or part of the purchase price furnished by the customer, is his "equity". The balance of the price, advanced for him by the firm in New York at the time delivery of stock is accepted by the firm, is the debit balance resulting from the purchase for his account (R. 62 and 68).

11. Before the customer can trade he must fill out a confidential report, and be accepted by a partner of the firm resident and active in the New York office (R. 57-58, and Exhibit 2 at page 35, Appendix A). A branch office cannot pass on a new customer (R. 58-59).

12. He must then sign what is known as an hypothecation agreement (R. 60-61, and Exhibit 4 at page 39, Appendix A). New York law requires this for the customer's securities to be pledged or commingled by the broker (R. 61).

13. The hypothecation agreement does not contain any promise to pay any debit balance. No money is owed by the customer upon signing it (R. 62). It does not compel the customer to trade (R. 62), nor does it compel the broker to execute an order for a trade if the broker has any reason for refusing it (R. 64).

14. The hypothecation agreement (Exhibit 4 at page 39, Appendix A) simply states the terms under which margin transactions, and principally the collateral thereof, will be handled, if and when any margin purchases or sales are made for the customer's account.

15. "These loans are made only in another state and never in the State of Florida." That has reference to the customer's obligations from advances for his account. This was proved by showing:

(a) No advances are made to a customer (R. 68 and 73);

(b) The Florida agents make no loans (R. 71 and 76);

(c) The Florida credits are restricted to "debit balances" resulting from purchases for the account of margin customers (R. 74);

(d) The exchanges where the payments are made by the firm which give rise to the customer's obligation to repay the advances are all located outside the State of Florida (R. 74). Ninety-nine per cent of the trading is on the New York Stock Exchange (R. 63);

(e) The placing of an order for a purchase on margin does not obligate the customer or create a debit balance, and nothing is owed when the trade is made on the exchange by brokers (R. 66);

(f) Nothing is owed by the customer until such time as the firm actually advances the purchase money (margin amount plus excess over margin) some time within two days after the exchange floor transaction (R. 67-68);

(g) These advances (ninety-nine per cent of them) are made in New York, to the seller of the stock, for the benefit of the customer (R. 74), or at the places where other, out-of-state exchanges are located (R. 74).

16. "No money or capital forming the source of such loans to customers is kept in this State" (R. 68 and 73).

17. "When such loans are made they are not evidenced by promissory notes or other writing (proved at R. 61 and 74) and are secured by retention of the securities in New York with the right in the broker of transferring them for its protection" (R. 68, 69, 71, 75, 102).

18. "The stocks, on which the firm has advanced part of the purchase price and, which it holds to secure the payment of the remainder due by the customer, are held in the foreign state." (R. 68).

19. "The debt 'is created by and under the laws of the State of New York, and independent of the laws of Florida.'" (R. 65-66 and 74).

20. "The copartnership does not resort to the laws of Florida to effect collection of debit balances, and the so-called agencies are not authorized to collect amounts." This was supported by evidence as follows:

(a) The branch offices are not authorized to collect a debit balance (R. 75).

(b) The firm has never sued a customer here (R. 75 and 88).

(c) Collection, where necessary to be enforced, is made by sale of collateral (R. 75 and 97).

21. "There is no competition with any business in Florida and the debit balances are not the result of any loans made by any representative here." This was shown as follows:

(a) The business is that of acting as commission broker on a stock or commodity exchange (R. 53). The branch office solicits such business (R. 56).

(b) There are no such exchanges in this state (R. 54).

(c) The purchases made for customers could not be handled by local businesses such as banks except through this or some other New York Resident Stock Exchange Member firm (R. 65 and 76).

(d) The distinction between this case and a branch store or branch office for local loans (which would compete with local merchants and local loan businesses) was brought out by showing that the firm is not a "dealer" and does not sell stocks to its cus-

tomers (R. 53), does not sell merchandise in this State (R. 73), and no money is advanced directly to customers or loans made in this State (R. 68, 71, 73, 74, 76).

22. "Whenever a customer wishes to pay to the firm any money in 'reduction or discharge of a debit balance, or for margin or additional margin,' he may deliver the money to the Florida agent who gives him in exchange a temporary receipt but the agent has no authority or control over the money received except to send it intact to New York or to place it in a bank account from which it may be withdrawn only by the principal office" (R. 76-77).

23. "Upon notice from the agent the customer's account in New York is then credited immediately with the amount of the payment." (R. 77-78).

24. "None of the moneys received by the agents may be applied by them to the expenses of the agency, funds for that purpose being supplied out of the firm's general capital and held in a local bank account separate from moneys paid to the firm by customers" (R. 77).

25. "All records of customers' accounts are kept at the home office and it is from there that all formal notices, reports of transactions and statements are furnished." (R. 73 and 76).

26. "Approval and acceptance of customers is made entirely in New York and with reference to these matters agents in Florida have no authority" (R. 57-59).

27. "In the conduct of its business the copartnership complies with the rules of the New York Stock Exchange and other exchanges, requirements of the laws of the State of New York and the acts of Congress" (R. 57-61 and 65).

In the final analysis an examination of the testimony and exhibits is, of course, the only possible means of verifying that every material allegation of ultimate fact in the bill of complaint is supported in the record by competent, uncontroverted evidence, (R. 1-16; 49-104 Appendix A).

Different conclusions were drawn from these facts by the Supreme Court of Florida in its first and second opinions. In the first opinion the Court unanimously found the intangibles involved possessed no business situs within the State of Florida. A change in the membership of the Court occurred before the second appeal was heard. Mr. Justice James B. Whitfield, after more than thirty years on the bench, resigned. His successor, not having heard the first appeal, held contrary, and his vote in favor of taxation gave the 4 to 3 majority on the second appeal. It is this last determination which we assert violates the constitutional guaranties asserted by the plaintiffs.

We, therefore, submit that the question of whether or not the State of Florida can deprive Appellants of property by levying and collecting a tax beyond that state's jurisdiction is not only raised but is moreover so inextricably intertwined with the heart and marrow of this litigation as to defy separation. No decision can be rendered herein, we feel, which does not unalterably affect the constitutional rights duly invoked by Appellants.

II.

The Questions Involved Are Substantial.

One way of determining whether or not the questions involved in this Appeal are substantial is to review what questions are presented. Fundamentally there is but one question, viz., Can the State of Florida lawfully tax certain intangibles owned by Plaintiffs, Appellants, a New York stock brokerage firm? The determination of this depends in turn upon whether or not the State of Florida has acquired taxable jurisdiction over the intangibles in question or, do these particular intangibles have a business situs within the State of Florida. In short the ultimate determination of the question thus rests upon the examination

of the individual facts of this particular case. This Court has consistently recognized such a problem as constituting a substantial and proper question for its determination.

It is true that this Honorable Court has held many times in various cases that the intangibles involved in those cases possessed a business situs within a given state seeking to tax them. It is likewise true that the court has many times held that various taxes were properly imposed by one state upon the citizens and residents of another because of the nature of the tax or some other factor besides business situs. This is the case with every single one of the citations offered by the Appellees in their "Statement as to the Jurisdiction and Motion to Dismiss" as a refutation of the substantiality of the questions raised upon this Appeal. The cases of *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, 27 S. Ct. 499, 51 L. Ed. 853, and *Liverpool & L. & G. Ins.* v. *Board of Assessors*, 221 U. S. 346, 55 L. Ed. 762, 31 S. Ct. 550, involved a taxing statute specifically directing the assessment of non-residents capital whether located within the State of Louisiana or not. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229 involved an income tax. *Curry* v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, 59 S. Ct. 900, 123 A. L. R. 162 involved a transfer tax at death.

In the Mississippi cases of *Stone* v. *General Contract Purchase Corporation*, 7 So. 2d 806; *C. I. T. Corporation* v. *Stone*, 7 So. 2d 811; *Stone* v. *General Electric Contracts Corporation*, 7 So. 2d 811; *Stone* v. *Universal Credit Co.*, 7 So. 2d 820; *Stone* v. *Yellow Manufacturing Acceptance Corporation*, 7 So. 2d 820, which this Honorable Court affirmed in 87 L. Ed. 23, et seq., the statutory levy was of a "privilege tax"; and finally in the case of *Utah* v. *Aldrich*, 316 U. S. 172, 86 L. Ed. 1358, 62 S. Ct. 1009, the tax involved was by the State of Utah upon a transfer of the shares of stock in a Utah Corporation, another excise tax.

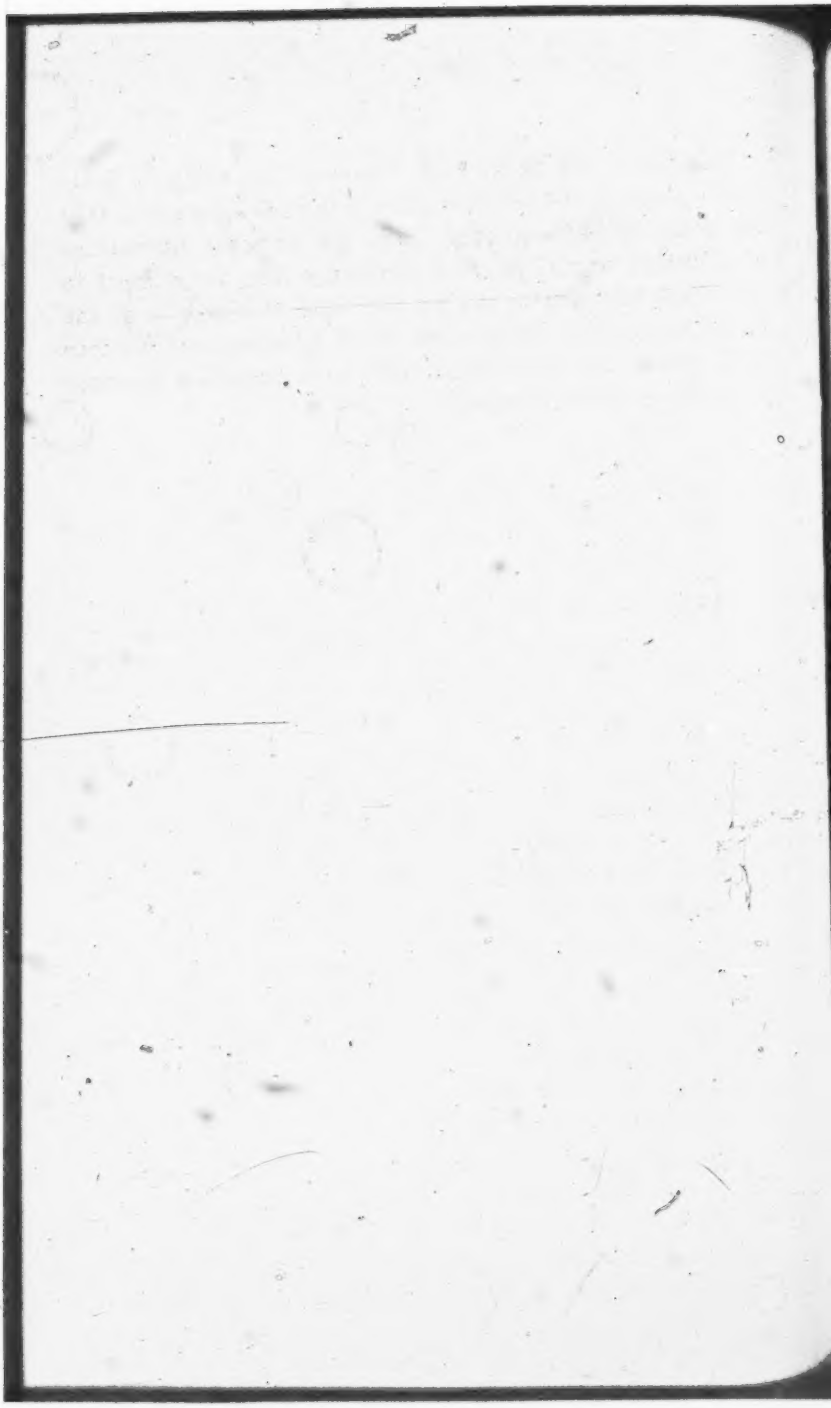
This Court has never held, however, nor had any State Court prior to the decision here under consideration, that the debit balances arising from the business operations of a foreign domiciled stock brokerage firm are subject to a general ad valorem tax by the state of domicile of the firm's customers where such debit balances are neither held, owned, nor by existing legal tests possess a business situs within the said state.

For these reasons, because the unanimous first opinion of the Supreme Court of Florida so indicates, and because of the 4 to 3 vote on the decision appealed from, we believe that the question raised by this Appeal is substantial.

Moreover, if the opinion of the Supreme Court of Florida from which we are appealing herein is adopted as the law by her sister states a new and onerous burden will be placed upon the nation's financial structure. The extent to which the stock brokerage business affects the economic life of the nation is a matter of common knowledge. An open invitation to forty-seven such additional taxing authorities to collect tribute from such operations must inevitably have a deleterious effect. This Court should examine the facts of this case to determine whether the 14th Amendment will permit such a levy.

Respectfully submitted,

GEORGE H. SALLEY,
CHARLES A. CARROLL.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 502

BERNARD EUGENE SMITH, ET AL., AS CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THOMSON & MCKINNON,

Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

J. TOM WATSON,
Attorney General of Florida;
LAWRENCE A. TRUETT,
Assistant Attorney General of Florida,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 502

BERNARD EUGENE SMITH, ALFRED WILLIAM MANSFIELD, HENRY HOLT, CHARLES FRANCIS HALEY, FREDERICK COSSITT ROGERS, TIMOTHY PATRICK BROSNAN, GEORGE HENRY ROSS, RICHARD FREDERICK TEICHGRAEBER, JOHN WHITNEY, JOHN WILEY JORDAN, JAMES ALOYSIUS KIERNAN, JAMES ARTHUR PRINDIVILLE, ANDREW MITCHELL MONTGOMERY, BENJAMIN EVANS BILLINGS, AND JOSEPH FRANCIS CROWLEY, AS CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THOMSON & McKINNON,

Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, VAN C. KUSSROW, AS ACTING TAX ASSESSOR, AND H. EARNEST OVERSTREET, AS TAX COLLECTOR IN AND FOR SAID COUNTY,

Appellees.

APPELLEES' STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Appellees believing that the matters set forth below will demonstrate the lack of federal question being raised or

decided by either the Circuit Court of Dade County, Florida, or the Supreme Court of the State of Florida, as well as the lack of substance in the question raised by this appeal, file this their statement in opposition to appellants' statement as to jurisdiction. Appellees include herein their motion to dismiss the appeal or in the alternative to affirm the judgment of the Supreme Court of the State of Florida on the ground that there was no federal question raised or decided as well as that the questions raised on behalf of appellants are so unsubstantial as not to need further argument. The matters here relied upon by appellees are more particularly stated below:

I.

No Federal Question Raised or Decided.

Bernard Eugene Smith, et al., a partnership doing business under the name of Thomson & McKinnon, filed their bill of complaint in the Circuit Court of Dade County, Florida, seeking an injunction against the collection of an intangible tax that had been levied against them by the tax assessor of Dade County, Florida, upon the marginal balances that were owing to this partnership by their Florida customers who had purchased stock "upon the margin". This levy is made against the balances as of January first of each year. Thomson & McKinnon claimed in paragraph 9 of their bill of complaint, in sub-paragraphs (a) through (x), in short, that they were not doing business within the State of Florida, and that these debit balances were not within the State of Florida, and therefore this property had no situs for taxation within the State of Florida. The tax assessor and tax collector filed a motion to dismiss this bill of complaint, which was granted.

Upon appeal to the Supreme Court of Florida this decision was reversed, the Supreme Court holding that the bill of

complaint stated a cause for equitable relief and the case was remanded to the lower court for further proceedings. (See appellants' exhibit 1).

Thereupon the tax assessor and collector filed their answer to the bill of complaint denying all of the material allegations thereof and setting forth fully the facts showing that Thomson & McKinnon not only were actually domiciled in the State of Florida but were doing business in this state the same as any other concern that was engaged in the business of lending money and taking collateral security therefor. (See paragraph 9 of defendants' answer.)

Upon this answer being filed Thomson & McKinnon did not take advantage of their right to test the sufficiency of the same by either a motion to strike or setting down the same on bill and answer. (See sections 63.38, 63.40 and 63.41, Florida Statutes, 1941, or Florida Chancery Act Annotated, sections 38, 40 and 41). Thomson & McKinnon therefore accepted the answer as constituting a defense to their bill of complaint and in effect joined issue thereupon and thereafter a master was appointed to take the testimony and to make his findings of fact and conclusions of law thereupon.

The proof consisted of the testimony of one Mr. Kiernan, a partner in the firm. Defendants offered no testimony because it appeared from the testimony of Mr. Kiernan on direct examination that the firm was doing business in the State of Florida and therefore was not able to maintain the allegations of their bill of complaint to the contrary and upon cross-examination this state of facts was more fully developed and it appearing conclusively therefrom that Thomson & McKinnon were doing business in the State of Florida the same as any local concern, the master had no other alternative but to find that Thomson & McKinnon had not proven the allegations of their bill of complaint and found this as a fact in the following words: "The plaintiffs

have failed to establish the material allegations of their bill of complaint". (p. tr. 48—when reference is made to printed transcript herein it refers to the one filed in the Supreme Court of Florida by Thomson & McKinnon in their last appeal.)

Therefore, when the cause was brought on for final hearing upon exceptions to the master's report filed by the plaintiffs Thomson & McKinnon, the chancellor also found as a fact that Thomson & McKinnon had not maintained the allegations of their bill of complaint and the chancellor confirmed and approved the report of the special master.

The record was in this state when Thomson & McKinnon appealed the case to the Supreme Court of Florida for the second time and the only question that was or could possibly have been before the court was whether or not Thomson & McKinnon, the plaintiffs below, had sustained the allegations of their bill of complaint. Of course there was no question raised nor could any have been raised as to whether or not the intangible tax statute of Florida as applied to plaintiffs was constitutional or unconstitutional because Thomson & McKinnon were in the position of a litigant who had failed to prove the allegations of its bill of complaint and the question submitted was simply whether there was a variance between the allegata and the probata. Therefore, when the Supreme Court of Florida came to a decision in this case it was of course necessary for it to decide the case upon the issue that was presented, and it did so and said exactly what the master and the chancellor below said. I quote from the last paragraph of its decision: "The appellants failed to establish by competent testimony the material allegations of the bill of complaint". (See appellants' exhibit 2.) However, before reaching this conclusion the Supreme Court of Florida very carefully analyzed the record that was before it and in great detail pointed out why the testimony of Mr. Kiernan did not

sustain the allegations of the bill of complaint and among other things said:

> "The customer resides in Florida, the original payment was made by him in Florida at the branch office; interest and broker commissions are paid in Florida; Florida law protects the branch office and business transactions had therein; Florida courts provide forums for adjudication of differences arising out of transactions, and for these several reasons *it cannot be said that the 'debit balances' originated in New York, as alleged, to the exclusion of the State of Florida.*"

We cannot see how by any process of reasoning can it be said that there was a federal question before either the lower court or the Supreme Court when the record is examined in the light of what we have said.

II.

Questions Raised on Behalf of Appellants Are So Unsubstantial As Not To Need Further Argument.

If this Honorable Court is of the opinion that it should go further in its consideration of its jurisdiction than to determine the first ground of our motion to dismiss or affirm, then we respectfully submit that this court has by its opinions over the years decided it was proper to apply a taxing statute similar to the Florida intangible tax act to persons, firms or corporations whose business was analogous to that of Thomson & McKinnon; however, in most of these cases the proof of an actual situs and the doing of business in the state was not as clear and convincing as in the instant case. We cite only a few of these decisions:

Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S. 395, 27 S. Ct. 499, 51 L. Ed. 853;

Liverpool & L. & G. Ins. v. *Board of Assessors,* 221 U. S. 346, 55 L. Ed. 762, 31 S. Ct. 550;

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229;
Curry v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, 59 S. Ct. 900, 123 A. L. R. 162;
Stone v. *General Contract Purchase Corporation*, 7 So. 2d. 806;
C. I. T. Corporation v. *Stone*, 7 So. 2d 811;
Stone v. *General Electric Contracts Corporation*, 7 So. 2d 811;
Stone v. *Universal Credit Co.*, 7 So. 2d, 820;
Stone v. *Yellow Manufacturing Acceptance Corporation*, 7 So. 2d 820;
This Honorable Court affirmed these cases in 87 L. Ed. 23, et seq.

The Supreme Court of Georgia relied on these decisions in a somewhat similar case that it had before it of *Settles* v. *Mutual Life Insurance Company*, 193 Ga. 495, 19 S. E. 2d 396, and gave one of the most comprehensive reviews of this Honorable Court's decision as could possibly be found in the reports. We commend it for consideration.

We find that the appellants are in the peculiar position in this case of being engaged in a general stock brokerage business in the State of Florida and of paying occupational taxes for the privilege of engaging in such a business in the State of Florida but that they are contending that they are not engaged in business in the State of Florida simply because they make some sales of stock "on the margin" which according to their contention may or may not be delivered to the customer and they make such a contention regardless of the fact that in these marginal sales transactions they are dealing with Florida customers under a contract executed in the State of Florida and are doing a general stock brokerage business within the State of Florida, all of which is permissible and protected because

the State of Florida maintains an organized society and must have revenue in the form of taxes with which to do so.

In conclusion we respectfully submit that from our examination of this Honorable Court's decisions we find that this court is more concerned with the practical operation of a tax in relationship to the benefits conferred by a state than in the ethereal theories that have been advanced before it from time to time.

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435, 444; 85 L. Ed. 267, 270; 61 S. Ct. 246; 130 A. L. R. 1229;
Utah v. *Aldrich*, 316 U. S. 172, 86 L. Ed. 1358.

WHEREFORE, appellees respectfully submit this statement showing that there was no federal question involved in this case either in the lower court or in the Supreme Court of Florida and that the questions submitted by the appellants to this Honorable Court are so unsubstantial as not to need further argument and appellees respectfully move the court to dismiss this appeal or in the alternative to affirm the decision of the Supreme Court of Florida entered herein.

J. TOM WATSON,
Attorney General,
State of Florida;
LAWRENCE A. TRUETT,
Assistant Attorney General,
State of Florida,
Counsel for Appellees.

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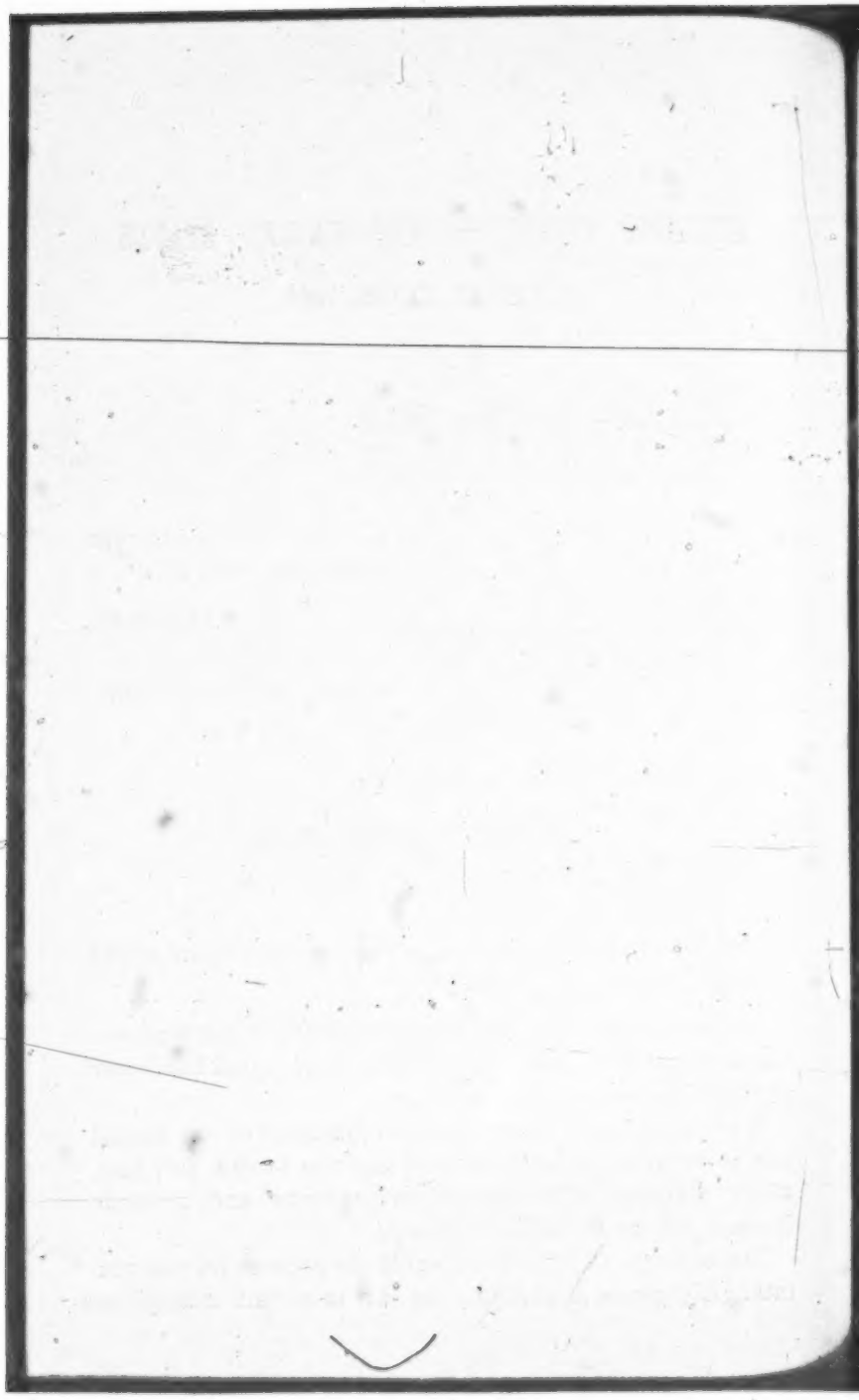

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 502

BERNARD EUGENE SMITH, ET AL., AS CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF THOMSON & McKINNON,

Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, ET AL.

PETITION FOR REHEARING.

To the Honorable, the Justices of the Supreme Court of the United States:

Come now the appellants and respectfully petition for rehearing as to the judgment of this Court, dated December 13, 1943, dismissing their appeal.

We respectfully suggest that the dismissal of the appeal was in error in certain material matters of law and fact, which matters, with petitioners' reasons and grounds thereon, are set forth below, to-wit:

The attempt of Florida to apply its general ad valorem intangible personal property tax law to certain intangibles

belonging to the New York Stock brokerage firm of Thomson & McKinnon raises these questions:

(1) *Do the intangibles have a business situs in Florida?*

(2) *If not, then is extra-territorial ad valorem taxation permitted as a substitute for an excise tax for soliciting business from within the state?*

Both propositions represent very substantial federal questions, where as here, the restraints of the Fourteenth Amendment of the Constitution are relied upon.

I.

The court overlooked the feature that the intangibles, on the facts established, are not in or localized in Florida according to decisions determining business situs.

A dismissal of the appeal, on the ground of absence of a substantial federal question, indicates the Court considered that the facts presented as to the intangibles in question showed them to fall clearly and unquestionably within the standard pattern of accounts receivable such as those derived from branch loan companies in a state, or from independent branch stores in a state, or from insurance loans based on loan capital sent into a state, or from sale of insurance, or from other independent businesses in a state conducted by a non-resident through agents there having discretion and having a substantial control of the capital which the accounts receivable replace and of the intangibles themselves.

In that respect this Court overlooked (1) the point that *all* of the facts of such a case are important; and (2) that the facts of this case show easily that the intangibles involved do not have a business situs in Florida.

The point as to close examination of *all* the facts surrounding the intangibles is important. One different fact or circumstance may prompt a contrary answer to that given in a case which, on cursory examination, appears to be within the pattern of a prior decision relating to business situs. This is particularly true in cases involving that question.[1]

It follows that determination of the question of business situs in any but the clearest case prompts full briefing and argument for its consideration by the Court.

On the matter of whether this case can be considered, on its facts, to be foreclosed by earlier decisions, we submit that it cannot. Here there were no loans made in the state, no loan capital sent into the state, no agents in the state with authority to make loans. These New York stock brokers do no brokerage business in the state—all exchanges are outside the state—there is no independent business in the state, all is ancillary to the brokerage business in New York. The agents in Florida are there to take and relay stock purchase and sale orders for customers. They solicit business. The New York firm, in New York, performs the (margin) stock purchase transactions on the New York Stock Exchange, which, and which alone, give rise to the accounts receivable from the customers which are sought to be taxed.

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[1] *Manufacturer's Trust Co.* v. *Hackett* (Conn.), 170 A. 792, 793.

In Re United Carbon Company Assessment (West Va.), 190 S. E. 546, 551, (1937). "We fully realize that at this time judicial determination of the question of the situs of intangible property for the purpose of taxation cannot be said to have reached the point where any settled and controlling rule can be laid down. Between those cases where the matter of situs renders such property clearly taxable and those cases where the lack of situs renders such property clearly not taxable, there is a 'twilight zone' into which, naturally, most of the controverted cases fall. The case before us belongs to that category, and it may well be that a slight difference in the showing upon which our conclusion is based would impel us to the opposite determination."

There are four types of stock brokerage transactions solicited by the agents in Florida: (1) purchases not on margin (where the customer supplies the full purchase price to be paid by the broker for the stock), (2) margin purchases, (3) sales, and (4) short sales. It is only on the second of those, the margin purchases, that the accounts receivable arise.

Those accounts receivable do not result from any loan of money *to* the customer, but from advancing a part of the price of the stock.

When the firm makes the purchase for the customer, in New York (and the firm is not obligated to make the purchase even after the customer has forwarded an order or request) the Exchange purchase contract which the broker makes is followed by delivery of the stock to the broker, who then pays the purchase price, using the portion or "margin" which the customer has posted for the purpose, and advancing the balance out of the general capital of the firm in New York. The resulting obligation of the customer to repay the firm for that advance is created then, and not before then, on quantum meruit by custom of the trade, and is not evidenced by any written note or agreement to repay. The stocks obtained are held in New York as security by the brokers, and when repayment is enforced it is by sale of the security—never by suit against the customer.

Those facts are sufficient to illustrate the extra-territorial nature of the intangibles. The accounts receivable just described are the objects of taxation of Florida.

No direct legislation is involved. The attempt to tax is that of county taxing officials, acting under direction of the State Comptroller, by seeking to apply to these intangibles the general ad valorem tax of Florida for intangible personal property.

The decision that no business situs existed in Florida for those intangibles was easy for the Florida Court when it

first considered the case, on the first appeal. By unanimous opinion it held that a business situs did not exist.[2]

On the second appeal, after the evidence had come in, the Florida Court (with one new member who had not heard the first appeal) switched over, and by a four to three decision held that the tax should stand. The court did not base its holding on the view that any of the above stated facts were not proved, but it took the view that the intangibles in question were *in* Florida because of certain factors which appeared from the bill at the outset, and which would exist in every case where any business is solicited in another state. The view of the Florida Court was that by soliciting business from people in Florida, the credits, which later arise from the transactions in New York, must be considered to have "originated" in Florida. That much can be said of any solicited business, and, of course, is not the test. It has no bearing on the question of business situs. The Florida Court's reasons for its conclusion as to the intangibles "originating" in Florida were (a) because the customers live there, and (b) because Florida law protected the agents, and (c) Florida law would settle disputes (if any) between the firm and the Florida people from whom the business transacted in New York was solicited.

That narrows down to a ruling by the Florida Court that if a non-resident has agents soliciting, in Florida, business of a kind which results in accounts receivable when the solicited business is performed out of the state for the customer's benefit, then the accounts receivable can be

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[2] *Hunt* v. *Turner*, 54 Fla. 654, 45 So. 509, the leading Florida case on business situs has been followed consistently, and the Florida Court adhered to it on the first appeal in the case, in 6 So. (2d) 625, saying, "Scrutiny of the plan of operation of the agencies in Florida clearly indicates that the property in question does not fall within the exception described in Hunt v. Turner, supra."

taxed by Florida, even though they do not have a business situs in Florida.[5]

We have taken the liberty of including the above discussion of the facts of the case and of the Florida decision appealed from in order to show this Court (1) that the facts not only fail to fall within any established pattern for business situs of intangibles, but show the contrary very clearly, and (2) that the Florida Court itself concedes those determining facts and does not purport to show a business situs for the intangibles (as in fact it cannot, because of its own decisions on that question), but nevertheless seeks to justify ad valorem taxation of the intangibles on other entirely novel grounds.

Assuming intangibles result from business transacted in New York for a Florida customer, whose business or account was solicited by the New York business firm through a soliciting agent in Florida, and assuming that the intangibles in question are not otherwise in or localized in Florida, does the fact alone that the business was solicited from residents of Florida sanction ad valorem taxation of such intangibles under a general tax law?

Is that question foreclosed by the cases cited by this Court's order?

When the due process and equal protection of the laws clauses of the Federal Constitution are invoked in seeking relief against an illegal exaction, is there not involved a substantial Federal question?

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[5] That is not only an attempt to tax property which is not within the state, but also amounts to a flagrant denial of equal protection of the laws. Before a Florida resident can avoid taxation based on his domiciliary ownership as to intangibles which arise from business conducted by him through agents outside the state and which are held out of state, he must show that they were used in the other state as an integral part of a separate independent business conducted there by agents with discretion and that they were not within his power to recall to Florida (*Hunt* v. *Turner*, 54 Fla. 654, 45 So. 509).

II.

The court overlooked the fact that the Florida Court decided the case without basis other than the assumption that a "trend" now allows extra-territorial ad valorem taxation as a substitute for a license tax for soliciting business.

Absent a Florida business situs for these intangibles, it is, of course, obvious that the state may not reach beyond its borders to extend or apply its property tax law to them.

This Court, by dismissing the appeal, has failed to take into consideration the point that while use of certain facilities of a state (such as by soliciting business through local agents) may be reason enough to impose an appropriate tax, it is no basis for imposing an ad valorem tax on foreign-held property of a non-resident over which the state has no territorial jurisdiction.

A license tax can be and in fact is imposed by the State, County and City governments in Florida, for the privilege of using the facilities of the state for furnishing market quotations and like conveniences to the public and for soliciting and relaying to the firm in New York the customers' orders for Stock Exchange transactions.[4]

In addition, the state can and does tax all tangible property of the firm which is located in Florida, and taxes the intangible (cash) of the firm which may happen to be there on January 1, the determining date.

If the taxing officials feel that the privilege of soliciting business from Florida should cost more than is now paid in license taxes, the remedy is by legislative increase of excise

[4] The firm pays license taxes, and pays taxes on its property in Florida. On the first appeal, the Florida Court said: "We emphasize that appellants allege they pay without complaint all ad valorem and excise taxes and likewise all taxes on intangibles that have a taxable situs in this state. The effect of what we have written is only to relieve them from the burden on intangibles the situs of which is fixed in the foreign state."

or license tax—not by attempting to apply the state's ad valorem intangible personal property tax to property of the firm which is *not* within the state.

The "trend," if there is any such thing, of recent decisions relating to state taxation is a fuller expression of the elemental principle that for use of a state's facilities a tax appropriate in kind and amount can be exacted by the state.

That simply means that *all* acts of a non-resident performed in a state for which it is proper and reasonable to impose an excise or license can be made subject thereto. It also means that *all* property *which is in the state* may be reached by a property tax. Those are very different propositions from one contending in effect that nowadays a state can exceed its territorial jurisdiction by taxing property *which is not in the state* because its owner has done an act in the state which could be (and is) the subject of a license or excise tax.

Moreover, if a license tax is to be imposed for soliciting business in the state, or an excise tax on the act of taking and relaying orders for New York Stock Exchange transactions, then such tax must have some fair relation to the amount or volume involved. We pointed out above that there are four types of purchase and sales transactions solicited, and that these intangibles result from only one out of the four. The amount of such intangibles, or the number of the margin purchase transactions made in New York which give rise to them, has no relation whatsoever to the number or volume of other types of purchases or sales handled by the firm as a result of solicitation of such business.

Therefore, it is clear beyond the need for any further comment, that as to the intangible property of the non-resident partnership which is not itself localized in Florida so as to give that state territorial jurisdiction for a property

tax thereon, the fact that the "order" for the New York Stock Exchange brokerage transaction out of which it arose "originated" from Florida, by having been solicited by the firm's agents there, can and does result in license taxes, but cannot serve to permit Florida to impose a property tax on property not within its borders. The state's attempt to do so is what would be done if Federal Constitutional limitations did not intervene.

The Florida Court's error, in supposing that language of other decisions which encourages proper taxation means that unconstitutional exactions should be sanctioned, is a basic and patent mistake.

III

The Court has overlooked the effect of the Florida decision.

If this decision is allowed to stand, then all prior decisions regarding business situs of intangibles will have no further effect. Gone will be the test that the intangibles must be in and used in the state, and the requirement that the equivalent property or capital from which they were derived must be in and used in the state in a regular independent business.

The requirement that the agents in the state have control over the intangibles or the transactions from which they arose, and otherwise act there as a separate business will be gone. Gone will be the recognized rule that the accounts receivable must have a permanency of location in the state so as to be a part of the mass of property in the state.[5]

The view of this Court, as expressed in *Curry* v. *McCanless*, 307 U. S. 357, 368, that it is the nature of the *use of the*

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[5] *Gulley* v. *C.I.T. Corporation* (Miss.), 150 So. 367. "* * * we take a business situs to be connected with the idea of more or less permanency of location of such credits, or with a purpose to incorporate them when collected into the mass of property of the state."

intangibles in the state which determines business situs will be done away with. [6]

In this Florida case the intangibles never have been and never will be in the state, or used in the state.

The result, as it affects the doctrine of business situs, will be that a state may tax all intangibles of a non-resident firm which can be traced to business it conducts (outside the state) on orders solicited in the taxing state, even though the intangibles in question clearly have no business situs in such state.

The power of the state of Florida to tax such foreign-held property, in the face of the Fourteenth Amendment to the United States Constitution, presents a novel and most substantial federal question.

Wherefore, on the grounds and reasons assigned above, the appellants respectfully petition for rehearing as to the order of December 13, 1943, by which this appeal was dismissed.

CHARLES A. CARROLL,
GEORGE H. SALLEY,
Counsel for Petitioners-Appellants.

Certificate of Counsel.

The undersigned, Charles A. Carroll, one of the attorneys for the Petitioners named and making the foregoing Petition for Rehearing, hereby certifies that the Petition is filed in good faith, and not for the purpose of delay.

Charles A. Carroll.

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[6] Although involving an excise tax, the opinion in *Curry* v. *McCanless*, supra, made one reference to the power of a state to levy a property tax on intangibles which had acquired a business situs apart from the place of domicile. In its reference to that situation the opinion recognized that the intangibles must be used in the business in the other state and cited certain of the Louisiana cases and other decisions which fully bear out our contentions as to the requisites for a separate business situs.

No. 502. SMITH ET AL., CO-PARTNERS, TRADING AS THOMSON & MCKINNON, *v.* LUMMUS, TAX ASSESSOR, ET AL. Appeal from the Supreme Court of Florida. December 13, 1943. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Liverpool Ins. Co.* v. *Board of Assessors*, 221 U. S. 346; *Curry* v. *McCanless*, 307 U. S. 357, 368. *Mr. George H. Salley* for appellants. *Messrs. J. Tom Watson*, Attorney General of Florida, and *Lawrence A. Truett*, Assistant Attorney General, for appellees. Reported below: 14 So. 2d 897.